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Protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, submitted in accordance with Commission on Human Rights resolution 2005/80, General Assembly resolution 61/171 and Human Rights Council resolution 5/1.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

Section II of the present report highlights the general activities of the Special Rapporteur since 1 January 2007 and also includes a summary of the official country visits he conducted to South Africa in April 2007, the United States of America in May 2007 and Israel in July 2007. In section III, the Special Rapporteur reflects upon some of the challenges to refugee law and asylum caused by global measures to counter terrorism. He examines issues such as pre-entry interception and screening measures related to border control; detention of asylum-seekers and shortcomings in securing court review of such detention; exclusion from refugee or other protection status; the application and non-derogability of the principle of non-refoulement; the return, repatriation or resettlement of rejected asylum-seekers, including persons detained for terrorism-related reasons; the use of so-called diplomatic assurances; and strengthening global responsibility for international protection as an inherent part of a comprehensive counter-terrorism strategy. The conclusions and recommendations are contained in section IV and include a number of specific recommendations to States regarding pre-entry and screening measures, compliance with international standards regarding detention of asylum-seekers, the obligation of non-derogation in respect of the principle of non-refoulement and States' responsibilities regarding release, repatriation and resettlement of detainees held for terrorism-related reasons.

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I. Introduction

1. This report is the third submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It is submitted pursuant to Commission on Human Rights resolution 2005/80,[1] General Assembly resolution 61/171 and Human Rights Council resolution 5/1.[2] It highlights his general activities from 1 January to 31 July 2007 and includes a summary of his official country visits to South Africa, the United States of America and Israel and a thematic discussion on the challenges to refugee law in the fight against terrorism.[3]

2. The Special Rapporteur draws attention to the report (A/HRC/4/26 and Add.1-3) he submitted to the Human Rights Council at its fourth session, in March 2007. The main report summarized the Special Rapporteur's activities in 2006 and focused on two thematic issues. Firstly, he studied the compliance of "terrorist profiling" practices with international human rights standards, as well as alternatives to the reliance on "terrorist profiles". Secondly, he examined the issue of suicide attacks as a specific form of terrorism and a specific challenge for responses that respect human rights, by providing a survey of the existing research and analysis on this phenomenon. In the context of suicide terrorism, he also addressed the issue of "shoot-to-kill" policies and other similar attempts to evade existing international standards on the use of firearms by law enforcement officials.

3. Document A/HRC/4/26/Add.1 contained a summary of the press releases issued and communications sent by the Special Rapporteur to Governments and the replies of Governments during 2006 regarding counter-terrorism issues such as current or draft legislation, as well as individual cases of persons detained, arrested or imprisoned for terrorism-related offences; A/HRC/4/26/Add.2 contained the final report of the fact-finding mission that the Special Rapporteur undertook to Turkey from 16 to 23 February 2006; A/HRC/4/26/Add.3 was a desktop study on human rights and counter-terrorism in Australia.

II. Activities

A. General

4. The Special Rapporteur, in accordance with his mandate, undertook a number of activities from 1 January to 31 July 2007. These are described below.

5. On 18 January 2007 the Special Rapporteur gave a keynote address entitled "Terrorism and counter-terrorism: the impact on human rights protection" at the launching event of the International Human Rights Obligations Network (IntHRON) at Lancaster University in the United Kingdom.

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[1] See *Official Records of the Economic and Social Council, 2005* and corrigenda, *Supplement No. 3* (E/2005/23 and corrigenda), chap. II, sect. A.

[2] See A/HRC/5/21, chap. I, sect. A.

[3] The Special Rapporteur recognizes the contribution by his academic research assistant, Kristina Stenman of Åbo Akademi University, Finland, as well as the assistance of the Office of the High Commissioner for Human Rights in producing the present report.

6. From 19 to 21 January 2007 the Special Rapporteur attended a conference at Wilton Park outside London focusing on United Nations human rights reform, including the future of the special procedures of the Human Rights Council.

7. On 31 January and 1 February 2007 the Special Rapporteur attended the sixth session of the Working Group of Experts on People of African Descent and its panel on racial profiling in Geneva and gave a presentation on profiling in the context of counter-terrorism.

8. On 8 February 2007 the Special Rapporteur gave a keynote speech entitled "Human rights and the fight against terrorism: challenges and opportunities" at the University of East London Centre on Human Rights in Conflict. On 9 February he held consultations with the international secretariat and several research teams at Amnesty International headquarters in London.

9. On 12 and 13 February 2007 the Special Rapporteur was in Geneva where he met with representatives of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Commission of Jurists. He also participated in a meeting of the Human Rights Council Intergovernmental Working Group on the Review of Mandates.

10. On 15 and 16 March 2007 the Special Rapporteur visited Turin, Italy, to participate in a meeting of the Counter-Terrorism Implementation Task Force. He provided input to ensure that the human rights dimension is included in the workplans and project documents being prepared by various working groups that have been formed to implement the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly in resolution 60/288 of 8 September 2006. The Special Rapporteur continues to participate in the work of the Task Force and its various working groups in accordance with his mandate, which requires him to develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, relevant United Nations bodies, specialized agencies and programmes, including the Counter-Terrorism Committee of the Security Council and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime.

11. On 16 and 17 March 2007 the Special Rapporteur was represented at a meeting convened in London by Interights on strategic litigation for lawyers working on issues related to renditions, torture, arbitrariness and impunity.

12. On 19 March 2007 the Special Rapporteur made a presentation to the Subcommitee on Human Rights of the European Parliament in Brussels and participated in a discussion on the alleged use of European countries by the United States Central Intelligence Agency for the transportation and illegal detention of prisoners.

13. From 20 to 26 March 2007 the Special Rapporteur was in Geneva to present his report to the fourth session of the Human Rights Council. He also had high-level meetings with representatives of the Permanent Missions to the United Nations Office at Geneva of Cuba, Israel, the Philippines, South Africa, Spain and the United States of America. He also met with various non-governmental organizations (NGOs) and gave presentations at two NGO events on issues related to his mandate. He had a meeting with legal advisers to the International Committee of the Red Cross. He also participated in a meeting regarding a fact sheet on human rights and

counter-terrorism being prepared by the Office of the High Commissioner for Human Rights.

14. On 10 April 2007 the Special Rapporteur sent a letter to the Executive Directorate of the Counter-Terrorism Committee in response to a written request by the Committee concerning its visit to Turkey in May 2007. The Special Rapporteur identified several human rights issues that merited further examination, such as the anti-terrorism legislation, the right to a fair trial and compensation for victims of terrorism. The Special Rapporteur hoped that the input provided would help start a dialogue with the Committee on future cooperation regarding country visits.

15. On 11 and 12 April 2007 the Special Rapporteur participated in an expert seminar, "Counter-terrorism strategies, human rights and international law: meeting the challenges", and gave a presentation at the session on assessing and positioning various forms of international terrorism. The event was hosted by the Grotius Centre for International Legal Studies of Leiden University, the Netherlands.

16. On 17 and 19 April 2007, while on an official country visit to South Africa, the Special Rapporteur gave two public lectures on human rights and counter-terrorism at Pretoria University and at the Institute for Security Studies in Pretoria.

17. From 2 to 4 May 2007 the Special Rapporteur visited Lund, Sweden, and participated in a workshop entitled "Human rights special procedures: the institution of the special rapporteur".

18. On 15 May 2007, in response to a request by the European Commission against Racism and Intolerance of the Council of Europe, the Special Rapporteur submitted comments on the issue of profiling in regard to a draft general policy recommendation on policing and profiling without discrimination. This policy was subsequently adopted during the Commission's plenary meeting in June 2007.

19. On 17 May 2007 the Special Rapporteur met with the Executive Secretary of the Inter-American Commission on Human Rights in Washington, D.C., to engage in a dialogue on human rights while countering terrorism and to discuss areas of possible cooperation regarding human rights and counter-terrorism.

20. On 17 and 18 May 2007 the Special Rapporteur was represented at the Symposium on Advancing the Implementation of the United Nations Global Counter-Terrorism Strategy in Vienna. The Symposium discussed implementation of the Strategy, including measures to address conditions conducive to terrorism and the promotion and protection of human rights which could also serve to strengthen the application of international criminal law and judicial cooperation.

21. On 31 May 2007 the Special Rapporteur participated in an expert panel on the "war on terror" at the Washington College of Law of the American University in Washington, D.C.

22. From 18 to 21 June 2007 the Special Rapporteur attended the fourteenth annual meeting of the special procedures of the Human Rights Council, held in Geneva, where participants primarily discussed issues arising from the Council's institution-building process. The Special Rapporteur held discussions with high-level representatives of the Permanent Missions to the United Nations Office at Geneva of Israel, South Africa and the United States of America. He also met with the respective ambassadors heading the Permanent Observer Mission of Palestine and the Permanent Delegation of the Organization of the Islamic Conference.

23. On 20 June 2007 the Special Rapporteur and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment gave a briefing to the Director of the Department of International Protection of UNHCR in Geneva in relation to the human rights of refugees in the context of countering terrorism.

24. On 20 June 2007 the Special Rapporteur gave a keynote address at a workshop on human rights and implementation of the United Nations Global Counter-Terrorism Strategy organized by the Centre on Global Counter-Terrorism Cooperation and the Graduate Institute of International Studies in Geneva. On 21 June he participated in a public panel discussion at the Institute that concluded the workshop.

25. Also on 20 July 2007 the Special Rapporteur met with members of the Human Rights Committee in Geneva and gave a briefing on his country visits and other country-specific work. He also briefed the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.

B. Country visits

26. The Special Rapporteur undertook three missions during the reporting period. The mission reports will be submitted to the Human Rights Council at a future session. The following paragraphs contain a summary of some of the Special Rapporteur's main preliminary observations that were reflected in a press statement issued during a press conference held at the conclusion of each country visit.

27. From 16 to 26 April 2007 the Special Rapporteur conducted an official mission to South Africa. On 26 April he issued a press release[4] noting that, in the context of emerging from apartheid rule, the term "terrorism" had been associated with widespread and systematic human rights violations by the previous regime. The Special Rapporteur identified some aspects of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (2005) as examples of good practice, but also expressed concern about certain elements of the legislation, including concerns about an overly broad list of crimes that may be treated as terrorist activity, protection of freedom of expression, and lack of clarity about the nature and scope of parliamentary action against persons listed by the Security Council and about the form and scope of potential judicial review. He drew attention to allegations of police brutality, community violence against certain foreigners and a concern about provisions in the law relating to the detention of foreigners and the implications of those provisions in the context of counter-terrorism. He observed that foreigners could be detained for security-related reasons without trial, and that there was no independent monitoring agency conducting visits to the police stations where they might be held. The Special Rapporteur highlighted that South Africa played a key regional role and encouraged the Government to take the lead in ensuring the development of laws on counter-terrorism that were in conformity with international human rights standards.

[4] See full text of press statement at www.unhchr.ch/huricane/huricane.nsf/view01/2972818321758A90C12572C900476EA5?opendocument.

28. From 16 to 25 May 2007 the Special Rapporteur conducted an official mission to the United States of America. On 25 May he issued a press release[5] wherein he expressed his view that the United States, as a world leader, had a special responsibility in the protection of human rights while countering terrorism. He outlined the international public law framework, including the application of international human rights law during armed conflict, and that of the extraterritorial application of international human rights law. The Special Rapporteur expressed grave concern about the situation of detainees held at Guantánamo Bay and detainees held in other locations, and the lack of judicial guarantees and fair trial procedures afforded to individuals suspected of terrorist activity, as well as the transfer of terrorist suspects. He drew attention to several problems related to the use of military commissions to try terrorist suspects, including jurisdictional and evidentiary issues, as well as issues regarding the independence and impartiality of the commissions and their potential use to try civilians. The Special Rapporteur also expressed concern about the interrogation of terrorist suspects. He addressed the issue of "extraordinary rendition" of terrorist suspects and their detention in "classified locations", and the accountability of those responsible for conducting interrogations using techniques amounting to torture or cruel, inhuman or degrading treatment. The Special Rapporteur also noted other issues such as national definitions of terrorism, the alleged targeted killings of terrorist suspects by United States agents, the provision of compensation to victims of terrorism, profiling, community outreach, the effect of counter-terrorism measures on immigration and refugee status and the impact of surveillance on the right to privacy.

29. From 3 to 10 July 2007 the Special Rapporteur conducted an official mission to Israel; he also visited the Occupied Palestinian Territory. On 10 July he issued a press release[6] in which he encouraged the Government of Israel to reconsider its derogation from aspects of the International Covenant on Civil and Political Rights under a declared state of emergency and welcomed the invitation extended to him to provide comments on a future draft law on counter-terrorism. The Special Rapporteur also examined the route and the effect of the barrier (wall/fence) being built by the Government of Israel. He consulted with the Government and non-governmental agencies in Israel and the Occupied Palestinian Territory to assess the effectiveness of the barrier in combating terrorism and its impact on all human rights, and in particular the economic, social and cultural rights of the Palestinian people. He also expressed concerns regarding the Government's practice of targeted killings and the interrogation techniques used by the Israeli security agency. Other issues that the Special Rapporteur will examine in the mission report are the definition of terrorism, the detention of security suspects, administrative detention and military courts, the use of human shields and the rights of victims of terrorism.

[5] See full text of press statement at www.unhchr.ch/huricane/huricane.nsf/view01/15B4F3535CE9EB5FC12572E600569287?opendocument.

[6] See full text of press statement at www.unhchr.ch/huricane/huricane.nsf/view01/75D990D98804F51FC12573140049A174?opendocument.

III. Challenges to refugee protection posed by counter-terrorism measures

A. Background

30. The Special Rapporteur wishes in the present report to focus on the impact of counter-terrorism measures on the international refugee protection regime and the right to seek asylum. He is mindful of the difficult security challenges posed by the threat of terrorist acts. He underlines, however, that States in international human rights treaties and other instruments, including the United Nations Global Counter-Terrorism Strategy and its plan of action, have clearly reiterated their obligation to respect and ensure the right to seek and to enjoy in other countries asylum from persecution, enshrined in article 14 of the Universal Declaration of Human Rights. In the plan of action for the strategy, States resolve:

> To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.[7]

31. Immigration control policies of States are part and parcel of the international system of protecting individuals from their forcible return to States where they may face persecution, torture or other inhuman treatment, or gross or protracted, systemic human rights violations. The Special Rapporteur wishes particularly to underline this point in the context of counter-terrorism.

32. Many issues which the Special Rapporteur has focused on in his previous reports relate to challenges facing foreigners, including immigrants and refugees, in their enjoyment of human rights. This pertains, for instance, to the issue of profiling in the context of counter-terrorism, which the Special Rapporteur addressed in his report (A/HRC/4/26) to the Human Rights Council at its fourth session. In the present report, he highlights certain issues that have a particular bearing on the possibility of individuals to access protection and determination by States of their need for international protection. These issues are: pre-entry interception and screening measures; detention of asylum-seekers; exclusion from refugee or other protection status, including in relation to the application of the principle of non-refoulement; the conditions of returned and rejected asylum-seekers; repatriation or resettlement of persons detained for terrorism-related reasons; and strengthening global responsibility for international protection. These are concerns which the Special Rapporteur has also encountered in his engagement with individual States, for example during his country visits to Turkey (see A/HRC/4/26/Add.2), South Africa, the United States of America and Israel, and his desktop study on Australia (see A/HRC/4/26/Add.3), and in exchanges with regional organizations such as the Council of Europe.

33. The Special Rapporteur in this context wishes to draw attention to the mandate and responsibility of UNHCR as the primary body in the United Nations structure in charge of the international protection of refugees and of supervising adherence to the 1951 Convention relating to the Status of Refugees (hereinafter the 1951

[7] General Assembly resolution 60/288, annex, para. 3.

Refugee Convention). Refugee law, in the Special Rapporteur's view, can be seen as constituting one branch of human rights law. General human rights instruments, in turn, contain many provisions that complement the 1951 Refugee Convention and the rights expressed therein. In the field of counter-terrorism, many of the challenges to human rights are so directly linked to asylum-seekers, refugees and immigrants that the impact of counter-terrorism measures on the international protection regime and the right to seek and enjoy asylum from persecution must also be seen as being at the core of the mandate of the Special Rapporteur.

34. In the international measures to counter terrorism, unwarranted linkages between refugee protection and terrorism threats were made evident soon after the atrocious terrorist attacks of 11 September 2001. In resolution 1373 (2001) the Security Council called upon States to ensure that they would not provide safe havens for terrorists, and to take measures to ensure that terrorists were not granted asylum and to prevent the abuse of refugee protection by perpetrators of terrorist acts.[8] Similarly, in the plan of action for the Strategy, States resolve not to grant safe haven to terrorists and resolve to take appropriate measures to ensure that asylum is not granted to terrorists.[9]

35. In dismissing unwarranted linkages between refugee protection and terrorism the Special Rapporteur emphasizes the humanitarian, civilian and non-political character of asylum and the many safeguards of the institution of asylum, such as the identification and exclusion of persons in respect of whom there are serious reasons for considering that they have committed heinous acts or serious crimes which render them undeserving of international protection. In the same vein, it should be recalled that refugee status does not shield a person against criminal prosecution, extradition or expulsion in accordance with due process and pursuant to articles 32 and 33 (2) of the 1951 Refugee Convention.

B. Pre-entry interception and screening measures

36. Being able to access another State to seek protection is a cornerstone of the international refugee protection regime.[10] At the same time, increased border security is one important aspect of States' measures to counter terrorism.[11] In the framework of international cooperation to counter terrorism, maritime interception operations by the United States and its allies have taken place, for example, off the Horn of Africa as part of Operation Enduring Freedom, and in the Mediterranean by the North Atlantic Treaty Organization within Operation Active Endeavour. While such actions have primarily been targeted at intercepting vessels suspected of

[8] See para. 3 (f) and (g).

[9] General Assembly resolution 60/288, annex, sect. II, paras. 2 and 3.

[10] See UNHCR Executive Committee Conclusion on International Protection Nos. 6 (XXVIII), 85 (XLIX) and 99 (LV) which reaffirm the fundamental importance of the observance of the principle of non-refoulement, both at the border and within the territory of a State, of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees, and stressed that the principle of non-refoulement and non-rejection at the frontier requires access to fair and efficient procedures for determining status and protection needs.

[11] For instance, the Counter-Terrorism Committee is scheduled to hold its fifth special meeting with specialized and regional organizations on the theme "Prevention of terrorist movement and effective border security" in Nairobi from 29 to 31 October 2007. See www.un.org/sc/ctc/.

carrying terrorists or weapons to be used in terrorist acts, prevention of all illegal activities, such as human trafficking or illegal immigration, has also been one aspect of these operations, which in turn may have a spillover effect on genuine asylum-seekers.[12]

37. This development is not related only to counter-terrorism measures, but has been a part of developing immigration control policies since the 1980s. Concern over such interception practices have been voiced by UNHCR, among others, over the years.[13] The Special Rapporteur welcomes the UNHCR position advocating for protection-sensitive entry systems.[14] Other aspects of immigration control which have been evolving strongly over the last two decades and have gained increased momentum as examples of reportedly useful counter-terrorism measures are increased attention to travel document security and exchange of passenger and immigration data.

38. While the Special Rapporteur recognizes the need for increased border security as part of an effective counter-terrorism strategy, he is concerned that few concrete measures are taken to compensate for the increasing difficulties that persons encounter and must overcome in order to access protection. For persons seeking international protection, their only means of leaving their home country and accessing another State to seek protection is often the use of fraudulent travel documents and resorting to the assistance of smugglers. The principle of not penalizing the asylum-seeker for illegal entry is also recognized in article 31 of the 1951 Refugee Convention.[15] Increasing border control and pre-screening measures without adequately addressing the difficulties encountered by persons seeking protection will undermine the global regime of refugee protection and human rights, inter alia the protection against refoulement.

39. The Special Rapporteur identifies a need for closer cooperation between States and UNHCR to counteract the negative effects of pre-entry immigration control measures and interception operations while at the same time remaining vigilant in respect of the threat of terrorism.

C. Detention of asylum-seekers

40. The right to liberty and security of the person, as guaranteed by article 9 of the International Covenant on Civil and Political Rights, is an ongoing concern for the Special Rapporteur in carrying out his mandate. Some States in their counter-terrorism measures have sought to circumvent their obligations in this respect and

[12] Factsheet of the Common Joint Task Force-Horn of Africa available at www.hoa.centcom.mil/facts.htm. On the mandate and activities of Operation Active Endeavour, see www.afsouth.nato.int/JFCN_Operations/ActiveEndeavour/Endeavour.htm. See also Maria Sanminiatelli, "NATO says Mediterranean patrols deter terrorism", Associated Press, 18 December 2006.

[13] See e.g. UNHCR, *State of the World's Refugees 2000*, chapter 7 — Asylum in the industrialized world, box 7.4 Haitian asylum-seekers, at http://www.unhcr.org/publ/PUBL/3ebf9bb10.pdf; UNHCR, *State of the World's Refugees 2006*, chapter 2 — Safeguarding asylum, box 2.3 The Tampa Affair: interception and rescue at sea, at http://www.unhcr.org/publ/PUBL/4444d3c320.html.

[14] See Refugee Protection and Mixed Migration: A 10-Point Plan of Action, UNHCR, January 2007.

[15] See article 31 (1) and (2) of the 1951 Convention relating to the Status of Refugees regarding obligations of the Contracting States in relation to refugees unlawfully in the country of refuge.

have introduced special provisions relating to persons suspected of terrorist acts that allow for lengthy or even indeterminate periods of detention without proper legal safeguards.

41. Apart from special provisions related to detention of terrorism suspects, most States' immigration legislation contains provisions for the detention of foreigners, including asylum-seekers. In many countries with which the Special Rapporteur has engaged, it appears that as one measure to counter terrorism, such detentions are increasing or taking new forms that may lack the safeguards required by international human rights standards. The administrative detention of foreigners, including asylum-seekers, raises issues related to the necessity and proportionality of such measures, the right to speedy and effective court review of any form of detention, the rights of detained persons including their right to the best attainable health, and possible violations of the prohibition against discrimination. Detention, particularly over protracted or even indefinite periods, has in numerous studies been found to affect adversely the mental health and well-being of detainees.[16] Conditions of isolation, often in remote locations, in detention centres or prisons may also heighten the risk of detainees being subject to abuse or violence, in contravention of articles 7 and 10 of the International Covenant on Civil and Political Rights.

42. Article 9 of the International Covenant on Civil and Political Rights and other instruments of human rights and refugee law do allow for the administrative detention of immigrants in certain circumstances. However, the Human Rights Committee, in the case of *A v. Australia* (communication No. 560/1993), inter alia, has considered that in order to avoid being characterized as arbitrary, detention should not continue beyond the period for which there is appropriate justification.[17]

43. Two scenarios can be discerned in detention on the basis of immigration regulations: either existing immigration legislation is used to detain individuals seemingly on grounds related to immigration controls, or special detention regimes are introduced based on terrorism-related security concerns.

44. In Australia, on which the Special Rapporteur conducted a desktop study in 2006, the Migration Act 1958 allows for the indefinite detention of a person who is to be deported from Australia. The Australian Refugee Council reported that, on 31 December 2004, of those in immigration detention more than 200 persons had been held in detention for longer than 24 months. The Special Rapporteur in his study on Australia expressed his grave concern over the unlimited length of detention under the Migration Act.

45. In South Africa, where the Special Rapporteur conducted an official visit in April 2007,[18] the 2002 Immigration Act allows for detention of deportable immigrants, without any mandatory judicial review until 30 days of detention have elapsed. In security-related cases, it also transpires that detainees are often held in

[16] See e.g. Carmen Lawrence, "Mental illness in detained asylum seekers", *The Lancet*, vol. 364, Issue 9441, 2 October 2004, pp. 1283-1284.

[17] *Official Records of the General Assembly, Fifty-second session, Supplement No. 40* (A/52/40), vol. II, annex VI, sect. L, para. 9.4.

[18] The mission report on South Africa is expected to be considered at a future session of the Human Rights Council.

police stations, where there is no oversight on a regular basis by any independent monitoring agency.

46. An example of a specific, security-related detention regime is Operation Liberty Shield, which the United States of America introduced at the beginning of the Iraq invasion. The policy was operational during March and April 2003, and was then quietly dismantled. The onset of the policy was a result of an internal security analysis according to which the risk of terrorist attacks against United States interests was heightened during that time. While the Operation had many different components, from food security to escorts of vessels, the most obvious implication for foreigners was the automatic detention of asylum-seekers from certain countries of origin for the duration of the asylum procedure, including countries where Al-Qaida operated or where Al-Qaida supporters were known to dwell. According to non-governmental sources, the countries of origin included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran (Islamic Republic of), Jordan, Kazakhstan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan and Yemen, as well as Gaza and the West Bank.[19] The Special Rapporteur notes that such detention regimes, based sweepingly on the country of origin of asylum-seekers, clearly risk violating the prohibition against discrimination.

47. Another example from the United States of America, where the Special Rapporteur conducted an official visit in May 2007,[20] relates to the risk that increased attention to security concerns in relation to asylum and immigration may generally lead to an atmosphere in which detention of immigrants and asylum-seekers and other restrictive measures are more broadly accepted. This kind of approach is reflected in United States Attorney-General Ashcroft's decision in *Matter of D-J* in 2003. It concerned the possibility of bail from detention for an 18-year-old Haitian asylum-seeker. The Attorney-General stated:

> I conclude that releasing respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy. As demonstrated by the declarations of the concerned national security agencies submitted by [the Immigration and Naturalization Service], there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities. Such national security considerations clearly constitute a "reasonable foundation" for the exercise of my discretion to deny release on

[19] Lawyers Committee for Human Rights (now Human Rights First), *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, 2003, pp. 41-42 at www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf.

[20] The mission report on the United States of America is expected to be considered at a future session of the Human Rights Council.

bond under section 236(a). *See Carlson*, 342 U.S. at 534; *Barbour*, 491 F.2d at 578.[21]

48. In the light of alarming signals from various parts of the world that well-established international standards concerning the deprivation of liberty of immigrants or asylum-seekers are being eroded in the name of fighting terrorism, the Special Rapporteur wishes to remind States of their obligations under international law, primarily by reference to article 9 of the International Covenant on Civil and Political Rights.

D. The principle of non-refoulement

49. The principle of non-refoulement, i.e. the prohibition against sending an individual back to a situation where he or she may experience a threat to his or her life or freedom, or risk being subjected to persecution, torture or any other form of cruel, inhuman or degrading treatment or punishment is well established in human rights treaties, including the 1951 Refugee Convention, and is to be considered a part of international customary law. The prohibition of refoulement under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "rendition", and non-admission at the border.[22] Article 33 (2) of the 1951 Refugee Convention contains a limited possibility for exception on the basis of very serious security concerns of the asylum State, whereas the principle as set out in article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is unconditional.

50. One of the most serious challenges to human rights in the years following 2001 has been the questioning by many States of the principle of non-refoulement. Even in Europe, where this principle has long been well established in the case law of the European Court of Human Rights on the basis of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), it was called into question. The Commission of the European Union suggested in its Working Document soon after the attacks of September 2001 a possible future need for the Court to review its position:

> The European Court of Human Rights has repeatedly affirmed that the European Convention on Human Rights, even in the most difficult circumstances, such as the fight against terrorism and organized crime, prohibits, in absolute terms, torture and inhuman or degrading treatment or punishment. The European Court of Human Rights has emphasized that, unlike most of the substantive clauses of that particular Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation. Following the 11 September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3,

[21] www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3488.pdf.

[22] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol, 26 January 2007, para. 7. See also UNHCR, Note on Diplomatic Assurances and International Refugee Protection, August 2006, at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164.

in particular on the question in how far there can be a "balancing act" between the protection needs of the individual, set off against the security interests of a state.[23]

51. In some recent cases before the European Court of Human Rights related to article 3 of the European Convention on Human Rights, the Governments of Italy, Lithuania, Portugal, Slovakia and the United Kingdom of Great Britain and Northern Ireland have been granted the right to intervene as third parties.[24] The Special Rapporteur finds it extremely worrying that these Governments appear to be seeking to weaken the Court's established case law relating to the principle of non-refoulement.[25]

52. An issue related to non-refoulement, which has frequently arisen in relation to deportations of persons allegedly linked to terrorism is that of States seeking diplomatic assurances against torture and other forms of inhuman treatment or punishment from States receiving a deported person. The Special Rapporteur draws attention to the findings of human rights treaty bodies in two related cases: *Agiza v. Sweden* by the Committee against Torture and *Alzery v. Sweden* by the Human Rights Committee. In both cases, a violation was found, respectively, of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and of article 7 of the International Covenant on Civil and Political Rights, despite diplomatic assurances received by Sweden from Egypt that Mr. Agiza and Mr. Alzery would not be subjected to torture or other inhuman treatment or punishment upon return to Egypt.[26]

53. The Special Rapporteur also notes that States have sought to carry out security-related deportations of persons with little or no possibility for them to challenge such deportations before an independent and impartial body. He underlines that, despite the exception clause on security grounds set out in article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee has clearly stated that the possibility for such review of deportation decisions is an inherent part of article 7 of the Covenant. The Committee's view, expressed in *Ahani v. Canada*,[27] was reiterated in the *Alzery* case.[28] The Special

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[23] Commission of the European Union, Commission Working Document, "The relationship between safeguarding internal security and complying with international protection obligations and instruments", COM (2001) 743 final, 5 December 2001, para. 2.3.1, p. 14 at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0743en01.pdf.

[24] European Court of Human Rights, press release issued by the Registrar, application lodged with the Court, *Ramzy v. the Netherlands*, 20 October 2005.

[25] Amnesty International, UK intervenes in European Court to support deportation despite torture risk. 11 July 2007 at www.amnesty.org.uk/news_details.asp?NewsID=17409.

[26] Committee against Torture, *Agiza v. Sweden*, communication No. 233/2003, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44* (A/60/44), annex VIII, sect. A; and Human Rights Committee, *Alzery v. Sweden*, communication No. 1416/2005.

[27] *Ahani v. Canada*, communication No. 1051/2002, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. II, annex IX, sect. BB. See, in particular, paras. 10.6-10.8.

[28] See paragraph 11.8 of the Committee's views in *Alzery*: "As to the claim concerning the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the Committee notes that article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering

Rapporteur therefore strongly advises States against the use of accelerated procedures in asylum cases and deportation procedures if such procedures do not include an effective, independent and impartial remedy operative before the execution of a removal decision. In the assessment of the Special Rapporteur, any other than a judicial remedy is unlikely to meet the demanding requirements of human rights law, as spelled out in the *Agiza, Ahani* and *Alzery* cases by United Nations human rights treaty bodies.

E. Release, repatriation and resettlement of detainees held for terrorism-related reasons

54. As a result of counter-terrorism measures undertaken by certain States, including the United States of America, individuals have been captured, detained, including being held in unacknowledged locations, and subjected to extraordinary rendition involving practices of proxy detention in unacceptable and non-monitored conditions. This may have even resulted in long-term situations of detention, particularly for persons apprehended in Afghanistan and Iraq. The Special Rapporteur is encouraged by positive signals he received during his official visit to the United States of America of the Government's plans to close down one of the most long-standing places of detention of terrorism suspects, the military detention facility at Guantánamo Bay.

55. The Special Rapporteur, in principle, supports initiatives to return security detainees to their countries of origin when suspicions of terrorism do not result in prosecution and conviction. He wishes, however, to underline that the individual situation of each detainee must be carefully assessed, and that some individuals may have a well-founded claim to international protection. He further emphasizes States' obligations in such situations to fully comply with the standards set in international law, including full respect of the principle of non-refoulement. This includes respect for the threshold set out, primarily by article 7 of the International Covenant on Civil and Political Rights, that no return must take place to a country where a "real risk" of torture or any form of cruel, inhuman or degrading treatment or punishment exists. He underlines that, for example, a threshold of non-return only where it is "more likely than not" that a person will be subject to "torture" (as defined by national law) is not in compliance with international law.

56. The Special Rapporteur underlines the absolute (non-derogable) nature of the protections of article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Hence, suspicions of a person's involvement in terrorist activities, including being put on a terrorist list by a national Government or even by the Security Council, do not alter the detaining State's obligations under the principle of non-refoulement.

57. The Special Rapporteur further underlines that diplomatic assurances sought from a receiving State to the effect that a person will not be subjected to torture or

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the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant." See also paragraph 13.8 of the *Agiza* case.

any other form of cruel, inhuman or degrading treatment or punishment do not absolve the duty of the sending State to assess individually the existence of a "real risk" of such treatment. The same obligation to conduct an individual assessment exists also in relation to the risk of persecution or the risk of capital punishment in contradiction with article 6 (right to life) or article 14 (right to a fair trial) of the International Covenant on Civil and Political Rights, or for countries that themselves have abolished capital punishment.

58. In the view of the Special Rapporteur diplomatic assurances can, at best, be taken into account as one of the several factors to be addressed in the individual assessment of the risk. Furthermore, such assessment must be subject to effective and independent, preferably judicial, safeguards. Mindful of the fact that diplomatic assurances against torture or inhuman treatment, even when accompanied by post-removal monitoring, tend not to work in practice, the Special Rapporteur discourages the creation of removal or resettlement mechanisms where such assurances would play a central role.

59. The Special Rapporteur emphasizes that even in situations of released detainees, the principle of non-refoulement is applicable where a person is liable to the imposition of the death penalty in a jurisdiction where the standards of trial fall short of rigorous compliance with article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial.[29] Furthermore, countries that themselves have abolished capital punishment may in no circumstances return a person to another country where he or she would face a real risk of being sentenced to death or executed.[30]

60. The Special Rapporteur is aware that some countries have expressed their readiness in principle to receive persons who would be resettled from Guantánamo Bay. The Special Rapporteur emphasizes that the United States of America has the primary responsibility to find solutions for any individuals among those detained in Guantánamo Bay who are in need of international protection. To enable such a process the Government of the United States must fully cooperate with UNHCR so that the Office is able to fulfil its mandate and, if required, conduct confidential interviews with detainees in order to establish if there are any detainees in need of international protection and to recommend those detainees for resettlement.

61. The Special Rapporteur underlines that where detainees in terrorism-related cases are to be released and cannot, in view of international law, be returned to their home countries, the primary responsibility to grant international protection rests with the detaining State. In the case of the detention centre at Guantánamo Bay, this responsibility hence lies with the Government of the United States of America.

62. The Special Rapporteur nonetheless welcomes indications that other States may be prepared to receive for resettlement persons originally detained for terrorism-related reasons but against whom no criminal charges have been initiated.

63. Furthermore, in order to create a resettlement framework that is in conformity with human rights, detaining States should not require from receiving countries that

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[29] See Human Rights Committee, general comment No. 6 (1982), reprinted in HRI\GEN\1\Rev 8, para. 7.

[30] Human Rights Committee, *Judge v. Canada*, communication No. 829/1998, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex V, sect. G.

they detain or monitor those returned in cases where such measures would not have a basis in international and domestic law. Equally, receiving States must not accept such conditions or resort to such measures.

64. The Special Rapporteur acknowledges that there may be valid humanitarian reasons for also resettling persons who after being detained for terrorism-related reasons are not determined to be entitled to refugee status or other form of international protection as a matter of right. In order to address the situation of such persons, detaining and other States need to include these individuals in their resettlement programmes. In the view of the Special Rapporteur, the High Commissioner for Human Rights may be well placed to facilitate such humanitarian resettlement through the use of her good offices.

F. Exclusion from protection

65. Historically, the 1951 Refugee Convention has clearly delineated refugee status as being excluded for certain categories of persons guilty of heinous acts and serious common crimes, to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.[31] In the period following September 2001, exclusion from refugee status has been to the fore in discussions on refugee law. UNHCR adopted new Guidelines on the application of the exclusion clauses in 2003.[32] In these recommendations, it is clearly set out that persons who have committed crimes against peace, war crimes and crimes against humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations may fall under established criteria in the exclusion clauses. Hence, terrorist acts may also fall within the ambit of application of the exclusion clause.

66. In line with the UNHCR Guidelines, the Special Rapporteur wishes to caution against overly broad interpretations of the exclusion clauses and to emphasize that the exclusion clauses should be applied in a restrictive and scrupulous manner. He also reminds States that international obligations under human rights and refugee law also encompass inclusion of refugees, that is, a duty to offer protection under the 1951 Refugee Convention and other international instruments to those in need of it. In the absence of a universally agreed definition of terrorist acts, some States have included in their national counter-terrorism legislation a broad range of acts which do not, in terms of severity, purpose or aim, reach the threshold of objectively being considered terrorist acts, or the threshold required for exclusion from refugee status. Such broad definitions have in many instances been used to suppress legitimate activities which fall within the ambit of the freedom of opinion, expression or association enshrined in the International Covenant on Civil and Political Rights.

67. Vague or broad definitions of terrorism are extremely problematic. For example, persons seeking international protection are in fact prosecuted for "terrorist-related" offences in their countries of origin when it may actually be that such persons and such prosecutions fall within the definitions of a "refugee" and the

[31] For the criteria for exclusion from refugee status, see article 1 F of the 1951 Convention relating to the Status of Refugees.

[32] Guidelines on International Protection: Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05), 4 September 2003.

concept of "persecution" in the meaning of article 1 A (2) of the 1951 Refugee Convention. Therefore, careful examination of the legislation and practice of countries of origin of asylum-seekers is necessary to accurately assess the possible application of exclusion clauses in the consideration of applications for refugee status or other status of international protection.

68. Some countries have also included in their legislation on asylum or refugee status determination caveats which exclude broad categories of asylum-seekers from being granted refugee or other protected status. Such provisions may, in fact, even lead to situations where persons who are victims of terrorism will be excluded from protection. The definition of "material support" to terrorist organizations which was included in the United States Patriot Act of 2001 has caused grave difficulties both for asylum-seekers seeking protection in the United States and for refugees seeking resettlement there. It is therefore welcome that the Secretary of Homeland Security has introduced at least a partial waiver to this procedure, although the Special Rapporteur remains concerned that the lifting of the material support ban is not, under United States legislation, open to judicial remedies.

69. The Special Rapporteur again reminds States that the application of the exclusion clauses of the 1951 Refugee Convention or analogous provisions in national laws does not absolve States from other human rights obligations in the case of involuntary return of foreign nationals. The principle of non-refoulement, discussed in detail above, is a rule of customary international law and cannot be derogated from under any circumstances.

70. The Special Rapporteur notes that the listing of terrorists may also have bearing upon international protection. Listing may be carried out on the basis of national practices or based on decisions by international bodies, such as the list prepared by the Al-Qaida and Taliban Sanctions Committee on the basis of Security Council resolution 1267 (1999). The Special Rapporteur dealt with the limitations, criteria and safeguards necessary in such listing procedures in his previous report to the General Assembly (A/61/267, paras. 30-41). He underlines that persons included in terrorist lists remain within the ambit of human rights law, the principle of non-refoulement being applicable and in need of particular attention.

71. The Special Rapporteur reminds Governments of their obligation to grant international protection to persons in need of such protection, in line with their commitments set out in the United Nations Global Counter-Terrorism Strategy. Inherent in this obligation is a duty to apply the exclusion clauses of article 1 F of the 1951 Refugee Convention in a restrictive and prudent manner.

C. Strengthening global responsibility for international protection as part of a comprehensive counter-terrorism strategy

72. Global action to counter terrorism has included, and continues to include, military operations, inter alia in the context of the invasion of Iraq. The protracted violence in Iraq and elsewhere has taken a severe toll on the civilian population and resulted in flows of asylum-seekers.

73. While rejection of certain asylum claims is part of a fair and well-functioning procedure for the determination of the need for international protection, the Special Rapporteur is concerned about practices in many States to reject and carry out

returns of asylum-seekers from countries with extremely volatile security and humanitarian situations, often related to military operations in the context of counter-terrorism. Afghanistan and Iraq are examples of such countries. In these countries, military action, armed insurgency and terrorist acts have led to a security situation where the delivery of even the most basic humanitarian assistance is hampered partly or fully, and where the protection of rights such as access to health care or to basic education is severely jeopardized.

74. In the case of Iraq, the situation has led to an influx of asylum-seekers, estimated in July 2007 at 2 million, to neighbouring countries, while many countries in Europe have all but ceased to grant to Iraqi nationals asylum or other residence status accorded on the basis of a need of protection.[33] Access to asylum procedures may even be hindered.[34] Such situations may lead to violations of the principle of non-refoulement, hardship and lack of fulfilment of even most basic human needs both for refugees and persons being forced to return to Iraq.

75. The Special Rapporteur is specifically concerned about the effects that returns in such contexts may have upon particularly vulnerable returnee households, including families with a female caretaker, unaccompanied children and youth who have no family networks in their country of origin. He also draws States' attention to the possibility that children and youth who are unable to access education and whose social and economic rights are not respected may in such situations be vulnerable to recruitment by criminals, armed groups and organizations carrying out terrorist acts.

76. The Special Rapporteur has identified a strong need for greater sharing of responsibility more generally in protracted refugee situations, which today often are intertwined with military insurgency, armed conflict and at times, terrorist acts against civilians. If security and humanitarian concerns are not appropriately addressed before repatriation of refugees and returns of persons found not to be in need of international protection[35] take place, there is an imminent risk of further destabilizing situations in the countries of origin and of undermining the protection of human rights of both the remaining population and of returnees. Transparent, profound and responsible analysis of conditions allowing for the return of rejected asylum-seekers or repatriating refugees and facilitating greater international coordination and cooperation to resolve conflicts and stabilize societies are needed. Such action is also necessary so as not to create conditions which may be conducive to the recruitment of terrorists and the spread of terrorism.

[33] Statement by George Okoth Obbo, Director, Division of International Protection Services, UNHCR, at the thirty-ninth meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme, available at www.unhcr.org/admin/ADMIN/4680c9bb2.pdf.

[34] UNHCR deplores forced return of 135 Iraqis by Turkey, 26 July 2007, at www.unhcr.org/news/NEWS/46a8aec30.html.

[35] See UNHCR Executive Committee Conclusion on International Protection No. 96 (LIV).

IV. Conclusions and recommendations

A. Conclusions

77. The Special Rapporteur first notes with satisfaction the commitment undertaken by States in the United Nations Global Counter-Terrorism Strategy and its plan of action to the standards of international law, including human rights law and refugee law, in guiding their actions. He sees this as an opportunity for Governments to revisit some of their measures taken since September 2001 and the adoption of Security Council resolution 1373 (2001), and to reassess the compliance of their measures with States' obligations, inter alia towards refugees and asylum-seekers.

78. The Special Rapporteur in the execution of his mandate has noted that in many regions of the world, States' counter-terrorism measures often disproportionately affect asylum-seekers, refugees and immigrants. In fact, genuine asylum-seekers with a well-founded fear of persecution may be the largest similarly situated group of persons in the world who are seriously and adversely affected by the post-2001 wave of new counter-terrorism measures. The Special Rapporteur is troubled that terrorism and national security are often used as an argument to enact or maintain more restrictive asylum and immigration regimes. He underscores that human rights law and refugee law, as they have developed over the decades, do take proper account of the security concerns of States, and that the new momentum in addressing terrorism does not, as such, justify the revamping of standards and principles of international protection.

79. In this report, the Special Rapporteur has sought to highlight some of the areas in which counter-terrorism measures may have an adverse impact on the international protection regime and the right to seek asylum, namely pre-entry apprehension and screening measures, detention of asylum-seekers and immigrants, application of the principle of non-refoulement, repatriation or resettlement of detainees in terrorism-related cases, exclusion from protection and the global responsibility for the international protection regime. Safeguarding and preserving the institution of asylum, including through non-rejection at frontiers and ensured access to asylum procedures, will require greater solidarity among States and better cooperation between States, UNHCR and deliverers of humanitarian assistance and development aid. At the same time, such a development will pave the way for greater stability and better respect for human rights in post-conflict situations, thereby narrowing the scope for potential recruitment of terrorists and support for terrorism.

B. Recommendations

80. In respect of pre-entry interception and screening measures the Special Rapporteur recommends that States, in cooperation with the Office of the United Nations High Commissioner for Refugees:

(a) Analyse the impact of pre-entry immigration control measures on the institution of asylum and the protection of refugees and other persons seeking international protection;

(b) Ensure that guidelines and practices in all military and border control operations involving interception or other pre-entry mechanisms are clear and fully respect the pertinent principles and obligations under international law, particularly refugee law and human rights law, towards persons seeking international protection;

(c) Establish national procedures for the determination of refugee and other protection statuses in line with international standards, as a means to create fair, reliable and efficient national systems of immigration control.

81. In order to secure compliance with well-established international standards in the field of the detention of asylum-seekers, refugees or immigrants, the Special Rapporteur urges States:

(a) To ensure that their legislation on immigration detention contains clear, transparent rules that take into account the requirements of necessity, proportionality, non-arbitrariness and non-discrimination, as required by refugee and human rights law;

(b) Not to depart from the right to judicial review of the lawfulness of any form of detention which, according to the Human Rights Committee, is not subject to derogation even at times of a public emergency[36] and, given the vulnerable situation of detained immigrants, to ensure that judicial review of any form of immigration detention is made automatic (mandatory) within a reasonable time, such as 48 hours;

(c) To ensure the right to effective access to legal counsel from the moment of detention, including by those detained on grounds of immigration law;

(d) To set up independent oversight mechanisms for the monitoring of the detention of immigrants and to ensure access by UNHCR or its designated partners to detention facilities;

(e) To open up all places of detention, anywhere in the world, to visits by the International Committee of the Red Cross, including situations where terrorism suspects are held in proxy detention at the request of another State.

82. Emphasizing the non-derogable obligation of States to respect the principle of non-refoulement, enshrined in respect of persecution in the 1951 Refugee Convention and in respect of other human rights violations in several regional or universal human rights treaties, the Special Rapporteur calls upon States:

(a) Not to return any person, even in cases related to terrorism, to his or her country of origin or a third State whenever there is a real risk of persecution, torture, or any other form of inhuman, cruel or degrading treatment or punishment, or the application of capital punishment in breach of the international obligations of the sending or receiving State;

(b) To ensure access to an independent and impartial, preferably judicial, review in cases of removal and to ensure that pending removal orders for such review are suspended;

(c) To exercise restraint in respect of so-called diplomatic assurances provided by the receiving State not to subject a person to torture or other inhuman treatment, as this can never replace the removing State's obligation to carry out an

[36] General comment No. 29 (2001), reprinted in HRI/GEN/1/Rev.8.

individual assessment of whether a real risk of torture or cruel, inhuman or degrading treatment or punishment exists in respect of the person;

(d) To ratify human rights treaties relevant to the principle of non-refoulement, including the 1951 Refugee Convention, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the optional protocols to the latter two treaties.

83. On the issue of release, repatriation and resettlement of detainees held for terrorism-related reasons, including from the United States military detention facility at Guantánamo Bay, the Special Rapporteur recommends:

(a) That the United States of America close down without delay its military detention facility at Guantánamo Bay and that the detainees be either put on trial for crimes they have allegedly committed or released;

(b) That, irrespective of the primary responsibility of the United States of America for the release, repatriation and resettlement process of Guantánamo Bay detainees not subject to criminal proceedings, all States be prepared to receive for resettlement persons originally detained for terrorism-related reasons but against whom no criminal charges have been initiated;

(c) That all States cooperate fully with UNHCR in establishing whether detainees are in need of international protection and to enable UNHCR to assist in the resettlement of detainees claiming to be in need of such protection, inter alia by allowing UNHCR to make an assessment of the situation of each individual detainee, including through confidential interviews with detainees;

(d) That the United States of America not require that receiving countries detain or monitor those returned in cases where such measures would not have a basis in international and domestic law, and that receiving States not accept such conditions;

(e) That detaining and other States include in their resettlement programmes persons who may not be entitled to refugee status or other form of international protection as a matter of right but for whom there are valid humanitarian reasons for resettlement, and that the High Commissioner for Human Rights make use of her good offices in facilitating resettlement in such cases.

84. As to the exclusion of persons for terrorism-related reasons from refugee status or other forms of international protection, the Special Rapporteur:

(a) Calls for a restrictive and scrupulous application of exclusion clauses, including through their strictly individual application and with particular caution taken as to national definitions of terrorist acts in the countries of origin of persons seeking international protection;

(b) Urges States not to include in their national immigration and asylum legislation definitions relating to exclusion from international protection that would go beyond the recommendations of UNHCR,[37] such as through the erroneous application of the exception to non-refoulement contained in article 33 (2) of the

[37] See, e.g., UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1), January 1992, paras. 147-163.

1951 Refugee Convention as an additional exclusion clause, which may effectively hinder persons in need of protection from obtaining asylum or some other protection status.

85. In order to strengthen global responsibility for international protection as part of a comprehensive counter-terrorism strategy, the Special Rapporteur recommends:

(a) That States and intergovernmental organizations commit themselves to a greater sharing of responsibility in protracted refugee situations, which today are often intertwined with military insurgency, armed conflict and at times, terrorist acts against civilians;

(b) That such joint efforts be based on a transparent, profound and responsible analysis of conditions allowing for the return of refugees as well as of the existence and risk of conditions that may be conducive to the recruitment of terrorists and the spread of terrorism, and greater international coordination and cooperation to resolve conflicts and stabilize societies.